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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 697

IRA S. MASON, ET AL., PETITIONERS

v.

THE TEXAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts (R. 122–132) is reported at 76 F. Supp. 318; the opinion of the Court of Appeals for the First Circuit (R. 193–198), at 171 F. 2d 559.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered January 5, 1949 (R. 199). The petition for a writ of certiorari was filed on April 5, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the licensed officers aboard the S. S. *Connecticut* who were interned by the enemy

after their ship was sunk are entitled, under their particular contract of employment, to a war bonus for the period of their internment.

STATEMENT

Petitioners were officers of the S. S. *Connecticut*—a vessel of American registry, owned and operated by the Texas Company, which employed petitioners and other members of the crew.[1] On August 1, 1941, the Texas Company entered into a collective bargaining agreement with the Texas Tanker Officers Association, an independent union composed of the licensed officers employed by the Texas Company (R. 24–37). This agreement among other things provided for a "war bonus" of 75 per cent of the employees' regular monthly wage "on each Trans-Atlantic voyage on which a vessel enters a port east of 30 degrees West Longitude" (R. 30). The agreement further provided that—"In the event of a total loss of the vessel due to hostilities or warlike operations, all licensed officers will be furnished transportation to a United States port and paid their full wages and war bonus until and including the day of arrival at such port" (R. 31).

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[1] The vessel was time chartered to the United States, and under clause 7 (a) of Point II of the time charter the Government, as charterer, is obligated to reimburse the Texas Company, as owner, for any war bonuses "based on the areas to be traversed during, or the ports of call of, any voyage" thereunder. It is for this reason that the Solicitor General appears for respondent.

Subsequently, changes were made in this collective bargaining agreement from time to time without the execution of formal amendments. Thus, on September 9, 1941, a representative of the company advised a representative of the union by letter that a section of the contract required alteration and that he had already directed the masters of the company's vessels to alter the shipping articles to incorporate the change without waiting execution of a formal amendment to the agreement (R. 110–111). Again, on December 4, 1941, pursuant to another exchange of correspondence, the wages provided under the collective bargaining agreement were raised (R. 178, 109).

Upon our entrance into the war in December, 1941, a Maritime War Emergency Board was established pursuant to a "Statement of Principles" signed by unions and operators in the Merchant Marine (46 C. F. R., 1943 Supp., p. 2124) to fix uniform conditions for the entire industry with respect to war risk bonuses and insurance and to replace the existing collective bargaining machinery in that regard[2] (R. 56–59). "All

[2] "Before the Statement of Principles was signed, war risk bonuses and insurance were the subject of collective bargaining between individual ship operators and unions. There were two controlling reasons why the maritime industry agreed to substitute a board in the place of a course of individual bargaining: first, inability to bargain intelligently for the want of adequate information with regard to the extent of war risks; and second, the desire for a uniform sys-

agreements and obligations arising as a result of collective bargaining," however, were specifically preserved (R. 57). The Maritime War Emergency Board[2] immediately promulgated comprehensive "Decisions," establishing for the entire industry uniform conditions in the areas of employment affected by the risks of war (R. 45–56, 60–104). Decision No. 2 covered war areas and bonuses (R. 74–88); Decision No. 5, payments to seamen while interned (R. 45–56). These decisions assured merchant vessel personnel of greater protection and higher compensation in connection with the war risks than that provided in the collective bargaining agreement involved in this case which had been negotiated when this country was still at peace.

The Texas Company immediately took steps to give its personnel the benefit of these Board decisions. On January 15, 1942, three days after Decision No. 2 was issued, it sent all its masters a copy of that decision with instructions to follow

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tem of war risk insurance and bonus instead of a system built upon piecemeal negotiation whereby one man's life might be insured for $2,000 and another man's for $5,000, or whereby vessels of two ship operators making identical voyages at the same time might pay different bonus for the same risk." (Statement issued June 21, 1944, by the Maritime War Emergency Board, 1944 A. M. C. 1020, 1022).

[2] The personnel appointed by President Roosevelt were: Dr. John R. Steelman, (Department of Labor); Capt. Edward Macauley, chairman, (Maritime Commission), and Dr. Frank P. Graham, (President of the University of North Carolina). 3 C. F. R., Cum. Supp., 1327.

it in the payment of war bonuses (R. 42). Both the conditions under which a war bonus was payable and the amount of such bonus under that decision were different from, and, in general, more favorable to the seamen than those set out in the collective bargaining agreement.[4]

The union took steps to obtain the formal adherence of the Texas Company to the decisions of the Board. On February 27, 1942, its representative wrote the company that the union, as a signatory of the Statement of Principles, "has agreed to abide completely, by decisions and clarifications of decisions issued by the Maritime War Emergency Board," and requested the company to "indicate whether or not you are abiding by or will abide by the complete Decisions and clarifications that already have been issued by the Maritime War Emergency Board?" (R. 174). The company replied to this letter on March 3, 1942,

[4] Under the union agreement the maximum bonus was equal to 75 percent of the employee's regular compensation, while Decision No. 2 allowed up to 100 percent in many areas. By subsequent modifications of this Decision the 100 percent bonus was made payable on all oceans of the world, except for a 40 percent bonus payable on wartime voyages along the West coast of the Americas. 1944 A. M. C. 1020, 1022. Under the union agreement a bonus was payable only on a trans-Atlantic voyage when a ship entered a port east of 30 degrees West Longitude; under Decision No. 2 bonuses were payable on all voyages, except those in the Gulf of Mexico, the Great Lakes or other inland waters of the United States and between Boston and New York east of 70 degrees West Longitude (R. 30-31, 74-88).

enclosing an addendum, already signed by the company and providing for signature by the officers of the union, which formally modified the collective bargaining agreement. The company's letter stated "You will note from the addendum that we have signified our willingness to abide by and, in fact, are already abiding by the decisions and clarifications heretofore issued by the Maritime War Emergency Board" (R. 38–40). Subsequent to this correspondence copies of all decisions of the War Emergency Board, including Decisions Nos. 2 and 5, were mailed to the company's masters (R. 113–115). But the addendum was never formally executed, apparently because of the union representative's induction shortly thereafter into the armed forces (R. 149–150).

Thereafter, on March 30, 1942, Ira Mason and Willard M. Carroll, the petitioners, both members of the Texas Tanker Officers Association, signed on board the American steamship, S. S. *Connecticut,* owned by the Texas Company, as first assistant engineer and first mate, respectively (R. 21–22). The shipping articles contained the following statement: "A war bonus payable on this voyage in accordance with United States Maratime Commission decisions" (R. 173).

On April 23, 1942, while the S. S. *Connecticut* was en route to Capetown, Africa, it was torpedoed. Mason and Carroll were taken into custody and kept on board various enemy vessels until September 22, 1942, when they were in-

terned on land by the Japanese. They were liberated about August 15, 1945. (R. 22–23.) Upon their liberation and return to the mainland, the Texas Company paid each of the men the wages called for in the collective bargaining agreement, as increased by the exchange of correspondence between the company and the union, and the war bonuses and other benefits required by the decisions of the Maritime War Emergency Board.

As required by the decisions of the Board, petitioners were paid a war bonus equal to 100 per cent of their regular pay for the period they had spent on water on our own and enemy vessels prior to their internment and during their return, as well as various area and port bonuses. Ira S. Mason was paid $14,265.69, Willard M. Carroll, $14,598.55, minus various payments made by the Texas Company to them or on their behalf during their absence (R. 105–106). Neither was paid a war bonus during his period of internment by the enemy. This action was brought for such bonus (R. 1–13).

The District Court, after a full trial, concluded that no additional compensation was due the libelants (R. 132). The issue in the case, as that court saw it, was "the meaning of the war bonus clause in the shipping articles in the light of the dealings between the parties under the conditions existing when those articles were signed" (R.

129–130). Examining these dealings, the court held that, by agreement between the company and petitioners' agent for collective bargaining, war bonus payments were to be made in accordance with the Maritime War Emergency Board decisions issued up to the time of the signing of the ship's articles. Since petitioners had received everything to which they were entitled under these decisions, nothing more was due them. In reaching its conclusion, the court also interpreted the collective bargaining agreement, as originally drafted, as not providing in any way for the situation that actually occurred, a sinking en route and subsequent internment of the ship's personnel. (R. 130.)

On appeal, the Court of Appeals affirmed the decision of the District Court (R. 198). It concluded that whatever view was taken of the case, no war bonus was payable during internment. Assuming that the original agreement entered into on August 1, 1941, was controlling and had not been modified, the court below, interpreting it the same way as had the District Court, found that the bonus provision contained in it had never become operative because the S. S. *Connecticut* was destroyed before entry into a port which rendered the bonus provisions applicable and, furthermore, that it was not intended to cover periods of internment by the enemy (R. 194–196). However, it agreed with the District Court that, in any event, before the shipping articles

were signed, the bonus provisions of the collective bargaining agreement had been superseded, by agreement between the union and the company, by the decisions of the Maritime War Emergency Board (R. 196–198).

ARGUMENT

This case raises no question of general importance. The issue is solely whether or not certain officers of the S. S. *Connecticut,* captured and interned by the enemy when the vessel was lost early in the war, were entitled under the terms of their particular contract of employment to a war bonus during internment. The shipping articles under which they sailed, a collective bargaining agreement, and the decisions of the Maritime War Emergency Board (hereafter referred to as the Board) are the three sources of their contractual rights. Both lower courts have properly concluded that none of these documents gave petitioners a right to the war bonus claimed.[5]

[5] Because it is so clear that petitioners are not entitled to a war bonus during internment by virtue of the collective bargaining agreement covering their employment, the court below did not pass upon, and we do not discuss, the question of the relative paramountcy of the collective bargaining agreement and the statutory shipping articles (R. 198). Cf. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332. Should the petition for a writ of certiorari be granted, however, we would defend the conclusion reached below on the ground, among others, that by reason of the statutory provisions the shipping articles, which were intended to make the Board decisions decisive as to the right to a war bonus, control, and not the agreements. *Steeves* v. *American Mail Line, Ltd.*, 154 F. 2d 24 (C. A. 9).

1. No question as to the proper interpretation of the decisions of the Board is raised by the petition which concedes that Decision No. 5, which fixes payment to seamen while interned as a result of enemy action, does not require payment of a war bonus during internment (Pet. 17). *Montoya* v. *Tide Water Assoc. Oil Co.*, 79 F. Supp. 677 (S. D. N. Y.); *Agnew* v. *American President Lines*, 73 F. Supp. 944, 949 (N. D. Cal). Petitioners' claims rest entirely on the particular terms of the collective bargaining agreement governing their employment. Concededly, private agreement may give a right to a war bonus during internment even though the decisions of the Board do not. *Steeves* v. *American Mail Line*, 154 F. 2d 24 (C. A. 9). Both courts below, however, have found that the private agreement existing here was that the decisions of the Board should be decisive of the rights of the parties, and the facts of this case permit no other result.

The record shows that the parties had agreed to be bound by the Board's decisions. Prior to the war, before internment of our seamen was contemplated, petitioners' agent for collective bargaining and their employer entered into a collective bargaining agreement calling for war bonuses on certain voyages. Neither the union nor the employer believed that changes in this agreement required any particular formality, and, in fact, no objection was made to unilateral modification of the contract by the Texas Com-

pany. Upon our entry into the war and the increase in hazards consequent thereon, including for the first time the risk of internment, the union joined in calling for establishment of a Board to fix new conditions of employment adapted to the changed situation. As signatory to the Statement of Principles establishing the Board, the union declared itself bound by its decisions. It so advised the Texas Company in writing and requested and secured the promise of the latter to adhere to these same decisions. Thereafter, the Texas Company abided by these decisions, making bonus payments in accordance therewith throughout the war without, so far as the record shows, any objection by the union.

Upon these facts, there can be no question that on the outbreak of war altering the conditions in regard to which the parties had originally contracted the bonus provisions of the collective bargaining contract were replaced, by mutual agreement, by the decisions of the Board. There is no merit in petitioners' suggestions, either that the subsequent negotiations were ineffective to modify the original agreement because "casual and inconclusive" (Pet. 8, 12–14), or that the result was not to abrogate the war bonus provisions of the original agreement (Pet. 7, 14–17).

It is elementary that a written contract may be varied by subsequent oral agreement (Williston, *Contracts* (Rev. Ed.), Secs. 591, 1828), which will not be prevented from operating by the mere fact

that the parties also manifest an intention to prepare and adopt a written memorial. Williston, *Contracts* (Rev. Ed.), Sec. 1828; *Restatement, Contracts,* Sec. 407. The conclusion reached by the court below—that by mutual agreement the collective bargaining contract had been superseded as to war bonuses by the decisions of the Board, despite the failure of the union to execute the written addendum to the agreement—merely represents the application of these well-settled principles to the particular facts of this case. Upon the outbreak of war, sharply increasing the dangers of ocean voyages and creating for the first time the possibility of internment, the parties redefined their general obligations regarding bonuses and also took account of this new possibility. As thus redefined, no war bonus during internment was required. Had the parties themselves not entered into a new agreement, the radical change in conditions with reference to which the parties had contracted itself might have been held to have terminated their mutual obligations. Cf. *North German Lloyd* v. *Guaranty Trust Co.,* 244 U. S. 12; *The Epsom,* 227 Fed. 158 (W. D. Wash.); Anno. 137 A. L. R. 1199, 1216. Here the parties themselves altered their agreement to meet the changed conditions—granting merchant seamen greater protection and increased compensation in connection with war risks, but deliberately making no provision for an internment bonus.

It is equally well settled that a contract containing a term inconsistent with the terms of an earlier contract between the same parties rescinds the earlier contract. *Housekeeper Pub. Co.* v. *Swift,* 97 Fed. 290 (C. A. 8); *Wood* v. *Brighton Mills,* 297 Fed. 594 (C. A. 3); Williston, *Contracts* (Rev. Ed.), Sec. 1826; Restatement, *Contracts,* Sec. 408. The decisions of the Board established bonuses totally different in amount and qualifying conditions from those fixed by the collective bargaining agreement negotiated before the war. The statement in the unexecuted addendum that the war bonus provisions of the agreement were to be "deleted and stricken" merely spelled out what the law would have implied in any event from the agreement to accept the Board's decisions.

2. But even if there were merit to petitioners' contentions that the collective bargaining agreement was never modified or rescinded by the subsequent negotiations, the questions they raise are wholly academic, since both courts below have found no right in the original agreement to the bonus petitioners claim. Only if the agreement gave such a right could it become significant whether the agreement or the decisions of the Board are controlling. The Court of Appeals, assuming, without deciding, that the collective bargaining agreement was in fact controlling, found no basis in it for upholding petitioners' claims, for two separate reasons: (1) the S. S. *Connecticut* was destroyed before it entered a

port east of 30 degrees West Longitude, and consequently the bonus provisions never became operative, and (2) the agreement did not contemplate payment of bonuses during periods of internment by the enemy. When the collective bargaining agreement was drafted, there could not have been any intention to pay an internment bonus because the United States was not then at war and internment was not then a possibility. And the fact that the Maritime War Emergency Board's decisions did not grant such a bonus in wartime indicates that there is no warrant for raising from the ambiguities of an agreement, drafted while we were at peace, an obligation deliberately not assumed by the maritime industry when war made internment a possibility.

Only after holding that the original agreement did not support petitioners' demand did the Court of Appeals go on to find that the agreement had, in fact, been superseded by the subsequent negotiations. The concluding paragraph makes clear that the opinion rests on both grounds (R. 198). As petitioners recognize,[6] the conclusion reached

[6] Although petitioners concede that the interpretation given the collective bargaining agreement by the courts below is a complete bar to their action, and does not warrant review here, they argue that the courts below "merely argumentatively suggested" this interpretation and that it was not "the true basis of their decision" (Pet. 8). Examination of the opinion of the Court of Appeals, of which almost one-third is devoted to the interpretation of the agreement, should be a sufficient answer to this contention.

by the court below as to the proper interpretation of the original agreement furnishes no ground for certiorari (Pet. 8).

CONCLUSION

Since the decision below is clearly correct and involves no question of general importance, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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